RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
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NO. 94-6790

IN THE UNITED STATES SUPREME COURT

OCTOBER 1994 TERM

HARVEY F. GARLOTTE *Petitioner*

versus

KIRK FORDICE *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Where a petitioner received consecutive sentences for possession of marijuana with intent to deliver and for two counts of murder and the sentencing order provided that three-year marijuana sentence be served before the two life sentences, petitioner was no longer "in custody" when habeas petition was filed, federal courts are without jurisdiction to consider issue and certiorari should be denied.

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NO. 94-6790
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Respondent, Kirk Fordice, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied in this case.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported as ***Garlotte v. Fordice***, 29 F.3d 216 (5th Cir., 1994). A copy of this opinion is before this Court as Appendix A to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1254(1). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Article IV, §2, cl. 1 and Amendment XIV.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below:

On September 16, 1985, Petitioner-Appellant, Harvey F. Garlotte entered pleas of guilty to one count of marijuana possession in an amount less than an ounce with intent to deliver and to two counts of murder. He was subsequently sentenced to a term of three (3) years pursuant to the marijuana charge and two concurrent life sentences pursuant to the charges of murder. The concurrent life sentences were to run consecutive with the three (3) year sentence imposed for marijuana possession. Although three (3) separate pleas were entered on September 16, 1985, the present appeal is targeted exclusively at the plea of guilty to marijuana possession.

Garlotte filed in the Circuit Court of Lamar County, Mississippi, a motion to vacate his plea of guilty to marijuana possession, which the lower court denied as being "plainly" without merit on November 3, 1986.

On May 18, 1987, petitioner appealed the denial of post-conviction relief to the Mississippi Supreme Court, alleging the following:

I.

The record presently before this Court is incomplete.

II.

The trial court erred in overruling appellant's motion to vacate his conviction.

III.

The trial court did not follow rule 3.03 of the Uniform Rules of Circuit Court Practice because it failed to determine there was a factual basis for the plea.

IV.

Appellant was deprived of the effective assistance of counsel because counsel failed to request a mental examination to determine appellant's competency to stand trial at the time he entered his plea.

V.

Appellant's plea of guilty was the product of undue influence by legal authorities and misleading information.

On August 10, 1988, the Mississippi Supreme Court denied the "facially meritless motion for post-conviction relief" in a written opinion. ***Garlotte v. State***, 530 So.2d 693 (Miss. 1988), rehearing denied September 28, 1988.

On or about October 20, 1989, petitioner sought relief by means of a Petition for Writ of Habeas Corpus with the United States District Court for the Southern District of Mississippi, Hattiesburg Division, alleging the following:

A. The trial court erred in accepting petitioner's guilty plea and did not adequately establish and ensure that petitioner's plea was voluntary, intelligent and knowing.

B. Petitioner was denied effective assistance of counsel in that his attorney:

1. Failed to see that original plea bargain was followed.

2. Failed to request a mental examination.

3. Failed to inform him of the realities of trial by jury.

4. Did not ensure petitioner's guilty plea as voluntary or intelligently and knowingly entered.

5. Failed to inform petitioner of possible defenses to charge.

6. Knew that petitioner's guilty plea was being entered involuntarily.

7. Had reason to believe that the indictment was obtained in an unconstitutional manner, yet made no attempt to attack the indictment.

8. Knew that he, the attorney, was laboring under an actual conflict of interest but made no attempt to resolve this problem.

9. Failed to prepare an interlocutory appeal to the denial of the Motion to Suppress the Evidence, and failed to inform petitioner such an appeal could be made.

10. Failed to argue the unusual and disproportionate sentence.

11. Failed to inquire of the court how intent element of charge was/would be established and to make the court aware of petitioner's lack of conscious control of substance and petitioner's previous guilty plea to lesser included offense within city court.

12. Failed to perform and function as the advocate and counsel guaranteed under the Mississippi and United States

Constitutions.

C. The trial court lacked jurisdiction to entertain and/or accept petitioner's guilty plea.

D. Petitioner was subjected to double jeopardy.

E. Petitioner's sentence was unusual and disproportionate.

F. Petitioner's guilty plea was the product of undue influence/coercion and/or misleading information.

G. Petitioner was incompetent at the time of the guilty plea.

H. Petitioner's guilty plea was not knowing, intelligent and voluntary.

I. Petitioner was denied full and fair consideration of his *pro se* pleadings by the Mississippi Courts.

On November 17, 1989, respondents filed a Motion to Dismiss for Failure to Exhaust, and on August 29, 1990, the magistrate recommended that the habeas petition be dismissed without prejudice. On June 25, 1991, upon reviewing an Order from the Mississippi Supreme Court, the District Court remanded the matter to the Magistrate Judge "for reconsideration". Respondents, on July 29, 1991, filed a Brief on Remand submitting that petitioner "seem[ed] to have exhausted his state court remedies", stating:

> The reason for the failure of the state to discover these two grounds[1] is that they were not included in the application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth

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[1]The two grounds were: (1) Petitioner was subjected to double jeopardy and (2) Petitioner's sentence was unusual and disproportionate.

exhibit and appeared, without careful reading, to be part of the prior pleadings filed in another case.

On February 13, 1992, the magistrate judge[2], after reviewing the case on its merits, filed his Report and Recommendation, and recommended that the petition for writ of habeas corpus be denied.

On February 19, 1992, respondent filed Respondent's Clarification of Exhaustion Issue in Report and Recommendation of United States Magistrate Judge.

On June 3, 1992, the District Court fully reviewed the magistrate judge's report, the objections of petitioner, and the response filed by respondents and adopted the Report and Recommendation as the finding of the Court, dismissing the habeas petition, and judgment was entered as required by Rule 58, Fed.R.Civ.P.

On August 4, 1993, the Court of Appeals for the Fifth Circuit ordered the district court to supplement the record with the state's Brief on Remand. On March 3, 1994, a certificate of probable cause was granted by the Fifth Circuit.

On August 19, 1994, the Fifth Circuit affirmed the district court's dismissal, but on the separate ground of the district court's lack of jurisdiction pursuant to 28 U.S.C. §2254. ***Garlotte v. Fordice***, 29 F.3d 216 (5th Cir. 1994).

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[2]At this point, the instant case had been assigned to all three Southern District magistrate judges at different times.

B. **Statement of Fact**:

In ***Garlotte v. Fordice***, 29 F.3d 216 (5th Cir. 1994) the court summarized the facts as follows:

> In 1985 Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of murder and received two life sentences which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.
>
> In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.
>
> On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived because exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it, dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

Garlotte, 29 F.3d at 217.

REASONS FOR DENYING THE WRIT

The Fifth Circuit properly affirmed the district court's dismissal of the writ for lack of jurisdiction as petitioner no longer met the "in custody" requirement at the time the petition was filed. Petitioner presents no cognizable claim

under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

Where a petitioner received consecutive sentences for possession of marijuana with intent to deliver and for two counts of murder and the sentencing order provided that three-year marijuana sentence be served before the two life sentences, petitioner was no longer "in custody" when habeas petition was filed, federal courts are without jurisdiction to consider issue and certiorari should be denied.

The Fifth Circuit properly ruled that Garlotte was not "in custody" for his 1985 marijuana conviction when he filed his petition for habeas corpus relief.

In ***Peyton v. Rowe***, 391 U.S. 54 (1968), this Court addressed what is sufficient to constitute being "in custody" for habeas corpus purposes. ***Peyton*** looked to ***McNally v. Hill***, 293 U.S. 131 (1934), which discussed whether a district court may entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences when he claims that a sentence he is scheduled to serve in the future is constitutionally invalid. In ***McNally***, the Court found that a petition for relief from such a sentence was premature. This determination was reached in light of the federal habeas corpus statutes's failure to define "in custody" and prior Supreme Court decisions regarding habeas corpus. ***McNally***, 293 U.S. at 138.

In ***Peyton*** the court noted that a federal writ of habeas

corpus was "substantially a post-conviction device which could afford prompt adjudication of factual as well as legal issues." ***Peyton***, 391 U.S. at 60. The Court emphasized that prompt adjudication of habeas corpus claims was imperative and further emphasized that allowance of collateral attacks on future sentences was required because "dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact." ***Id***. at 62. Regarding challenges to future sentences via habeas corpus, the Court stated:

> Of course prejudice to meritorious claims resulting from the kind of delay which ***McNally*** imposes is not limited to situations involving ineffective assistance of counsel. To name but a few examples, factual determinations are often dispositive of claims of coerced confession; lack of competency to stand trial; and denial of a fair trial. Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice. As the Court of Appeals observed:
>
> > Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater lapse of time the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. 383 F.2d at 715.

Peyton, 391 U.S. at 62-63 [citations omitted].

The ***Peyton*** Court found ***McNally*** inconsistent with the purposes underlying the writ of habeas corpus and, consequently, overruled ***McNally***: "[w]e overrule ***McNally*** and hold that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of Section 2241 (c)(3)" ***Id.*** at 67.

The net result is that a prisoner "in custody" under one sentence may, after ***Peyton***, attack a sentence he is scheduled to serve in the future. The reasoning provided by the Peyton Court concerning its overruling of ***McNally*** was that "postpon[ing] of plenary consideration of issues by the district courts undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings." ***Id.*** at 63. The ***Peyton*** Court therefore determined that an interpretation of 28 U.S.C. Section 2241's "in custody" language which would include consecutive sentences imposed, but not yet served, would eliminate the "inconsistencies between purposes and practice which flow from the ***McNally*** holding." ***Id.***. at 65.

The reasoning relied upon by this Court in ***Peyton*** and the problems it sought to remedy are equally applicable to the situation in which a prisoner waits until the sentence which he attempts to assail has expired before bringing his habeas corpus petition. ***Peyton***, in fact, specifically set forth as a prejudicial situation the very claim Garlotte now pursues, that he was coerced into entering a guilty plea. "[I]f the

allegations of his petition are false in fact, the [state] may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial." ***Id***. at 62, quoting appellate court opinion. The prejudice which results from the passage of time is at odds with the purposes of the writ, whether this time will pass before the petition may be filed or has already passed before the petition is filed.

The "in custody" language of the statute does not allow challenges to past confinements. In ***Maleng v. Cook,*** 490 U.S. 488 (1989), the Supreme Court held that after a sentence has fully expired, a habeas petitioner is no longer "in custody" merely because the prior conviction will be used to enhance a sentence imposed for subsequent crimes for which petitioner may be convicted. ***Id.*** at 492. Garlotte's three years sentence for his conviction of marijuana possession in an amount less than an ounce with intent to deliver clearly expired before 1989, the time he filed his petition.

Two other circuits have taken a contrary position, holding that the "in custody" issue, as regards expired sentences is governed by ***Peyton***. ***Fawcett v. Bablitch***, 962 F.2d 617 (7th Cir. 1992) cites ***Peyton v. Rowe, supra***, in a conclusory fashion, for the proposition that a prisoner in custody on any of consecutive sentences is in custody on all of them. ***Bernard v. Garraghty***, 934 F.2d 52 (4th Cir. 1991) contains some discussion of the facts and rationale of ***Peyton***, but concludes

that the difference between Rowe's attempt to challenge a sentence he was scheduled to serve in the future and Bernard's attempt to challenge a consecutive sentence he had already served was "irrelevant." ***Id.*** at 55. ***Bernard*** further claims ***Peyton*** held "dispositive the fact that the Virginia parole statute provided that Rowe's parole eligibility was to be determined on the basis of an aggregate sentence of fifty years, the total of his thirty-year and twenty-year sentences." ***Id.*** at 55. While the ***Peyton*** Court did address that statute it did so merely as regards the need for habeas petitioners to be able to attack sentences scheduled to be served in the future because of the prejudice their claims may suffer due to passage of time.

In the case *sub judice*, Garlotte argues that this Court's decision in ***Peyton v. Rowe***, 391 U.S. 54 (1968) controls this case. The Fifth Circuit points out in it's opinion affirming the district court's dismissal that:

> Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in ***Peyton v. Rowe***, 391 U.S. 54, holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. ***Willis v. Collins***, 989 F.2d 187 (5th Cir. 1993), quoting ***Young v. Lynaugh***, 821 F.2d 1133, 1137 (5th Cir. 1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 1040, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically he contends that but for his marijuana conviction, he would have been eligible

for parole consideration on June 5, 1995, instead of March 1, 1996.[3]

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. ***Capetta v. Wainwright***, 406 F.2d 1238, 1239 (5th Cir.), *cert denied*, 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since ***Capetta***, however, the Supreme Court stated in ***Maleng***:

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has fully expired at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925 (emphasis in original).

Garlotte, 29 F.3d at 218. The Fifth Circuit followed the rule established by ***Maleng*** in Garlotte's case, at least to the extent that ***Maleng*** and ***Capetta*** are inconsistent.

The Fifth Circuit, in affirming the district court's dismissal of the writ of habeas corpus, stated:

> In ***Peyton***, the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. ***Peyton***, 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in ***Peyton*** were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in ***Maleng***. Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in ***Peyton*** because he is not attempting to challenge a sentence he has not yet begun to serve.

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[3]According to the Mississippi Department of Corrections, Records Department, the petitioner's earliest parole eligibility date is December 2, 1995. Attached please find petitioner's Sentence Computation Data Sheet provided by the Mississippi Department of Corrections.

Garlotte, 29 F.3d at 218. The Court went on to explain that Garlotte's contention, that because his parole consideration date was delayed by the marijuana conviction the requisite nexus between the marijuana conviction and the murder conviction existed, was without merit.

Citing ***Maleng***, the Fifth Circuit found that because "Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a 'positive and demonstrable' nexus between the marijuana conv ction and the murder sentences he is not serving in order to meet the requirement of the ***Maleng*** exception established by this Court in ***Willis***." ***Garlotte v. Fordice***, 29 F.3d 216, 218.

Clearly, the Fifth Circuit in ***Garlotte v. Fordice***. 29 F.2d 216, followed long established precedent in arriving at its conclusion that Garlotte was not "in custody" for purposes of subject matter jurisdiction.

CONCLUSION

Because the Court of Appeals for the Fifth Circuit properly dismissed the petitioner's habeas corpus petition due to lack of subject matter jurisdiction, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE, ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

JO ANNE M. McLEOD
SPECIAL ASSISTANT ATTORNEY GENERAL
Of Counsel

BY: Marvin L. White, Jr.

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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above **Brief in Opposition** to the following:

Harvey F. Garlotte
MSP #X60710, SMCI Unit 14
Post Office Box 1419
Leakesville, Mississippi 39451

This the 30th day of December, 1994.

MARVIN L. WHITE, JR.

SENTENCE COMPUTATION DATA SHEET

NAME CARLOTTE, HARVEY

NO. X60710

SMCI

P. O. BOX 1419

LEAKSVILLE, MS 39451

TOTAL TERM OF SENTENCE LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORD 5DAYS & 102DAYS & 1DAY

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME ALLOWANCES (50% SENTENCE) 1YR. 6MONTHS

M.E.T. ALLOWANCE 180DAYS
(MET forfeited shall not be restored nor shall it be re-earned by the offender)

EXECUTIVE TIME ALLOWANCE

TIME OUT ON ESCAPE CREDIT ALLOWED FROM (DATE)

TIME OUT ON PAROLE

CREDIT ALLOWED FROM(DATE)

EARNED TIME FORFEITED

MET FORFEITED

EARLIEST PAROLE ELIGIBILITY DATE 12-2-1995

EARLIEST CONDITIONAL DISCHARGE DATE LIFE

EXCLUSIONS:

1. LIFE SENTENCE (X)
2. HABITUAL OFFENDER ( )
3. EARNED TIME ALLOWANCE FORFEITED BY ORDER OF THE COMMISSIONER: ( )
4. SEX OFFENDER(S) DENIED PAROLE BASED ON PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION: ( )
5. MANDATORY ARMED ROBBERY SENTENCE ( )

CONDITIONS:

TIME COMPUTATION OF CONSECUTIVE SENTENCE IS BASED ON EACH INDIVIDUAL SENTENCES.

NO INMATE IN ANY EVENT SHALL HAVE HIS SENTENCE TERMINATED BY ADMINISTRATIVE EARNED TIME ACTION UNTIL HE IS ELIGIBLE FOR PAROLE.

11-13-1992PS
DATE

(MS.) CHRISTINE HOUSTON
CHIEF RECORDS OFFICER

AFFIDAVIT OF SERVICE OF PROCESS

I, Marvin L. White, Jr., being duly sworn, state the following:

1. I am a member of the bar of this Court and I am counsel for the Respondent in this action.

2. On December 30, 1994, I personally placed the original and twelve (12) copies of the enclosed Brief In Opposition to the Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the case of Harvey F. Garlotte v. Kirk Fordice, No. 94-6790, in a package properly addressed to the Clerk of this Court, with first-class postage prepaid, and deposited the package in a mailbox under the exclusive control, care and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

3. I placed a copy of said Brief In Opposition in an envelope properly addressed to Harvey F. Garlotte, MSP #X60710, SMCI Unit 14, Post Office Box 1419, Leakesville, MS 39451.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

SWORN TO AND SUBSCRIBED BEFORE ME this, the 30th day of December, 1994.

Carolyn B. Carter
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Sept. 11, 1995

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

RECEIVED
JAN - 3 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MIKE MOORE
ATTORNEY GENERAL

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION DIVISION

December 30, 1994

Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Dear Mr. Suter:

Please find enclosed for filing the original and twelve (12) copies of Respondent's Brief In Opposition. By copy of this letter, I am forwarding a copy of this brief to the petitioner.

Thank you for your assistance in this matter.

Sincerely,

Marvin L. White, Jr.
Assistant Attorney General

MLW:jr/dsm

Enclosures

cc: Harvey F. Garlotte

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